REGARDING THE USE OF “EQUIVALENCE” AS “ANALOGY” IN CANON LAW*


C. J. Errázuriz M.

1. Premise

Juridical science seeks to find just solutions to questions that arise unceasingly from the dynamics of interpersonal relationships. In this perspective, human juridical norms, taken here in the broadest sense of the term, that is, not limiting them to those norms deriving from authority, but also embracing those that arise from social uses and the agreements of groups and individuals, are most helpful. However, as continual juridical experience shows, these norms are often insufficient to resolve juridical issues. So, to interpret and complete human norms, it is necessary to pay constant attention to the reality of situations, so that if an issue is to be resolved, we must search for what it just in these realities themselves.

This realistic way of seeing the work of the jurist, recently described most skillfully by Javier Hervada (1), among others, does not exclude recourse to existing juridical norms to try and understand better those norms that present hermeneutical difficulties or to fill in any gaps found in the legal system. In this regard, the use of analogy - a similibus ad similia - as a method for deriving juridical knowledge, is decisive. In fact, a legislative provision for one situation is frequently able to throw light on similar cases. This path was already formulated in Roman law (2), was known and used in juridical science throughout time (3), and used always in

_______________________________


(1) Cf. especially his Critical Introduction to Natural Right, Montreal 2020.

(2) Cf. especially the well-known Digest passage, widely used by medieval jurists: I, 3, 10-12.

(3) See V. PIANO MORTARI, “Analogia (Storia)”, in Enciclopedia del diritto, vol. II, Milan, 1958, p. 344-348; as well, for the juridical science of this century, G. CARCATERA, Analogia, I) Teorial generale, in Enciclopedia giuridica, vol. II, Roma, 1988. This last paper deals with the complex logical problems to which the normative-formal perspective gives rise in terms of analogy: in
the canonical context (4). The 1983 Code, almost identical to that of 1917, contemplates the analogy as a means of interpreting the existing legal norms (5), and as a way to fill any normative gaps (6).

However, we must stress that the use of analogy is not limited only to the resolution of concrete questions - although ultimately a juridical operation is always aimed at this immediately practical purpose - but it can also concern the formulation of criteria of a general nature, to be used to resolve many new types of cases or even to provide adequately for the entire legislation underlying a new juridical institution. This occurs in the so-called “equivalence”, which by virtue of doctrine, jurisprudence, administrative practice or legal norms (7), assimilates two different situations, with the effect of extending, to a greater or lesser degree, a juridical solution first conceived for one situation and then applicable to another one, because of its similarity to the former, under a certain juridically relevant profile.

In my opinion, they constitute an effective contrario sensu demonstration of how it is not possible to disregard reference to reality in juridical constructions. E.g. the “creativity” of every interpretation, increasingly felt by modern general theory of interpretation, represents an indirect observation of the function that depends on the juridical demands deriving from the same reality in the interpretation of any positive norm. On the way to overcome formalism, the hermeneutical thought of E. BETTI is known to have taken its cue from the juridical field (cf. in the juridical field his work on L'interpretazione della legge e degli atti giuridici, Milano, 1949).


(5) Cf. can. 17: “ad locos parallelos (...) est recurrendum”.

(6) Cf. can. 19: “causa (...) dirimenda est attentis legibus latis in similibus (...)”.

(7) The legal norms can sometimes explicitly declare an equivalent regulation - which corresponds to a reference to the norms that regulate another institute - (eg can. 516 § 1 establishes that the quasi-parish is equated with parish, unless the law provides otherwise); but implicit equivalence can also exist, such as configuring a new institution on the basis of an already existing one, which is appropriately adapted or modified for certain social purposes - (think of quasi domicile in relation to domicile - cf. cann. 102-107 - or of the Episcopal Vicar with respect to the Vicar General – cf. cann. 475-481 -). In these cases, the figure from which we start will serve as a hermeneutical key for implementation of the new figure, both as to common traits as well as to those specific to each one.
This use of analogy in the production and application of juridical norms is constant in all sectors of law, certainly not in the least in canon law. It suffices to think of three questions that in recent decades have greatly preoccupied the canonical world, to realize how frequent and complex are the problems that arise from normative, jurisprudential, administrative or doctrinal equations.

A first and very noticeable example is found in the area of institutes of consecrated life and societies of apostolic life, where the appearance of new charismatic and apostolic forms raised up by the Spirit in the Church has given more than abundant material to prove the merits of using analogy, but which also limits assimilation to existing realities (8). No less striking is a second example, this time in the area of ecclesiastical organization: issues arising from the appearance of new structures, especially those related more specifically to personal situations, question their similarity to traditional ones, or their differences; the first of which would be their relationship to a diocese (9).

A third example could be drawn from the field of canonical matrimonial law, where, in terms of incapacity, there has been a complex and troubled jurisprudential and doctrinal transposition of the figure of the impediment of impotentia to other cases of incapacity (10), giving rise to the current regulation of...

(8) Apart from the fact that ecclesiastical legislation can never be considered complete and perfect, since among other things the Holy Spirit always "surprises" with novelty, I believe that the process of clarification of the relations between secular institutes or societies of apostolic life and religious institutes is still open, so as not to exclude future arrangements that distinguish these different regulatory types, depending on their greater compliance with models of consecrated life or secular life tout court. I was able to refer briefly to this issue in relation to societies of apostolic life, in the article under the same title in Enciclopedia del diritto, vol. XLII, Milano, 1990, p. 1164-1167.


(10) We can recall that for some time there was much written about impotentia moralis, thus highlighting the construction by analogy of this new caput nullitatis.
can. 1095, 3°, whose relations with the aforementioned impediment still lead to discussions among authors.

Beyond the practical issues that arise in these cases or in others that are sufficiently numerous to seek out, both in the history of the canonical order and in contemporary situations, it appears useful for me to offer some brief reflections on “equivalence” at the level of fundamental canonical theory, above all to try and clarify its meaning and its scope.

2. Equivalence or juridical identity?

To avoid any sterile *lis de verbis*, I consider it opportune to preface our discussion by a terminological clarification of the expression “equivalence” and other analogous terms (especially “assimilation”, but also “equalization”, or others that I use as synonyms) (11). At first sight, they would denote only a relationship of equality between two realities. In fact, however, since it is an equality established either by a juridical norm, or by the judge or an administrator, or by the jurist who is considering theoretical issues, it would seem natural to conceive of it as an equality that is exclusively of the juridical order. Anyone wishing to highlight the differences that exist between two juridically equal realities in the canonical context should point out that they, despite their juridical equality, remain theologically different realities. In short, juridical and canonical equality would emphasize the equal juridical solution to be given, while at the same time implicitly hinting at real diversity, which in the case of Church law most often constitutes a diversity of a theological character (12).

---

(11) Although assimilation and equalization have sometimes been differentiated - whereas the former would be more intense than the latter (cf. *PONTIFICA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO*, *Relatio complectens synthesim animadversionum... cum responsionibus...*, in *Communicationes*, 14 [1982], p. 202 s.) -, I believe that this is only a question of degree. However, in this paper I do not distinguish between the two terms, since it seems to me that the canonical use - at least within the same Code - generally tends to use them without distinction (compare for instance can. 368, which uses the verbal form *assimilantur*, with can. 134 § 1 which, while precisely quoting can. 368, uses the participle *aequiparatae*). At other times in the canonical context, we use expressions such as *censeatur tamquam*, *habeatur pro*, *ad instar* and so forth.

(12) Here, I am relying on the common practice of canon law, which usually uses the adjective "theological" to refer to the supernatural reality of divine origin that founds and indeed represents the constitutive nucleus of juridical reality in the Church: that which in classical
Regarding the use of “equivalence” as “analogy” in canon law

This thought pattern, while taking account of aspects of truth that are not subject to doubt, does not seem entirely satisfactory to me. After all, there is a prior question that needs to be clarified: that of the relationship between the juridical and reality itself. For those who conceive the juridical order in a normative-formal way, as law - an optic that has been taken to the extreme by Hans Kelsen’s theory of pure law -, juridical equality means formal-normative equality. Consequently, two different realities treated in the same way by the legal system become not only juridically equal, but also identical under their formal juridical profile, since there is no element of law - understood as a set of formally valid positive norms - which serves to differentiate them. On the level of formal legal status, the distinction re-emerges only to the extent that the same norms reproduce it, perhaps in an exceptional way. But these differences in their real entity - independently of the positive juridical norms - would be considered juridically irrelevant by definition. The conception of “right” as a word separated from reality applies here, although it so often is thematized in different ways (for example through the absolute lack of communication between the spheres of “is” and “ought” - Sein and Sollen).

If, on the other hand, there are juridical realities that are independent of the positive legal system, both prior and fundamental with respect to it, the fact of the juridical equality of a given solution for two different realities - in other words, equalization – must always be based on a real equality existing prior to the establishment of the legal standard. This pre-normative equality, which can also be qualified as a true juridical equality in a non-positivistic perspective, will represent the ratio of equality established by the positive norm. Since the ratio is the same in both instances, there must be the same juridical solution for similar situations (ubi eadem ratio, idem ius, or ubi eadem ratio, ibi eadem iuris dispositio) (13). At the terminology is called "divine law" (especially under the form known as “divine positive law”). There is therefore no taking of any particular position in this use in relation to complex epistemological questions regarding the nature of canonical science and its relationship with theology.

(13) Obviously, this real equality that establishes and justifies equality under the law, often involves a prudential decision - whether of the competent authority or of private individuals - and which consists in choosing an equal treatment, based on the equality of existing reasons. In other words, it is necessary to make choices in which the reasons that call for an equal
same time, juridical assimilation - precisely because it is established for certain effects between two non-identical realities - will leave intact the real differences that are not being considered, but which may in themselves be juridically significant when resolving other issues not included in the equalization, or when determining exceptions to the alleged juridical equality. The canonical norms, moreover, marked by a traditional juridical realism far removed from formalist positivism, confirm this juridical relevance of reality by reference to the nature of things, and which is explicitly considered among the reasons of exception in the limiting clauses that usually accompany the normative formalization of the canonical equations (14).

Consequently, the juridical equality proper to equivalence is never absolute, not even as a juridical construct, because it always presupposes the existence of a diversity, which in itself is also juridically significant. If any juridically relevant diversity disappeared, we would no longer be faced with two equated realities, but, rather, with two identical cases from the juridical perspective, and which should therefore have the same juridical denomination (nomen iuris). In short, equivalence never implies identity, not even in the juridical sphere. Nullum simile est idem, to use the tradition of Western jurists (15).

3. Substantial equivalence and formal equivalence.

solution must be evaluated - reasons based on real existing equality - with those that point to the convenience of a diversity of legal treatment - reasons based on real existing differences -. What I wish to emphasize in the text is that this evaluation by prudence must always be based on reality, in order not to fall into simple arbitrariness, far from prudence. In fact, historically, there is no shortage of cases of unjust equivalence, such as those which assimilated many human beings to things and animals, through the institution of slavery, while favouring a social diversity that produced discriminatory effects, even in the recognition of the personality the law accords to a human being. On the other hand, there have been similarities that, over the course of time, have proven to be less adequate, as the knowledge of the differences between the equivalent situations progressed (this happened, for instance, in the public use of numerous notions deriving from private law, such as that of patrimonial domain, as used to describe the relationship between rulers and the territorial ambit of their government).

(14) For instance, the military ordinary "enjoys all the rights and is bound by the obligations of diocesan bishops, unless it is otherwise established by the nature of things or particular statutes" (cost. ap. Spirituali militum curae, 21 aprile 1986. II, § 1).

Juridical equivalence belongs, by definition, to the juridical sphere, that is to say to the effects of the search for juridical solutions (16). This formality of equivalence *in iure* is often highlighted through the adjective “formal”: we speak of formal equivalence, distinguishing it from the substantial one, which in the law of the Church is above all theological.

The previous terminology is not sufficiently insightful in light of a non-formalistic view of the juridical reality, because it can easily be considered that the substantial equivalence would be pre- or meta-juridical. The conception of formalistic positivism seems to creep in again, according to which juridicity could not be predicated of the reality of man and things with independence from positive norms.

However, it is possible to reformulate the distinction in a realistic form, considering that the equivalence is formal to the extent that it is based on positive norms, and substantial in that it rests on the reality prior to such norms. But it must be immediately pointed out that, as I have already noted, every juridical positive-normative equivalence - formal -, to be just and therefore truly juridical in the proper sense of the term, must always be based on a real - substantial - juridical equivalence that constitutes its *ratio*. Otherwise the formal equivalence would be irrational and therefore unjust and juridically invalid. Orio Giacchi argued vigorously, in one of his famous articles (17), the need to overcome the conflicts between substance and form. I wonder if it would not also be opportune to overcome the same terminology of “substance” and “form”, to eradicate every possible type of formalism from the conception of the law of the Church, as well as from any juridical reality.

On the other hand, it must be remembered that by its very nature equating admits degrees: more or less. These degrees are made explicit by human norms,

______________

(16) I think this is what E. CORECCO wished to highlight when he wrote that “while it is possible to attribute the same juridical relevance, *ex parte* or *ex toto*, to two realities of positive institutional extraction (for example a personal prelature and a diocese), it is not possible to apply the legal institution of assimilation to two realities ecclesiologically different (for example an Apostolic prefecture and a particular Church).”

17 *Sostanza e forma nel diritto della Chiesa* first appeared in the journal *Jus* in 1940 and was republished at the beginning of his monograph *Il consenso nel matrimonio canonico*, Milano, 1968, p. 1-21.
which formalize it in a more or less entire way, with more or less effects, and with more or less limits and exceptions. Although the prudential nature of the elaboration of the norms prevents a formulation of mathematical proportions, it can be said that a greater substantial equation will have to be of greater formal equivalence, and vice versa. If the substantial equivalence is particularly broad, the language will tend to highlight this fact, and it will therefore speak of substantial equivalence, giving the impression that the formal or normative is but an almost mere recognition of that real foundation. If, on the other hand, there is a real but very limited similarity, linguistic use will highlight the work of the juridical norm in assimilation, and it will be natural to speak of formal equivalence. Yet, again, there will be talk of formal equivalence even when it occurs between realities whose configuration arises from positive norms, and of substantial equivalence when it comes to realities that predate norms. However, it cannot be forgotten that in juridical equality there will always be, in various measures, a formal and substantial equivalence.

Even in the traditional case of juridical fictions, in which it would seem that the norm collides with reality, this contrast is only apparent; in truth, it is a kind of equivalence, in which - often because of the rigidity of certain pre-existing formalistic schemes - the new case is formally named by the \textit{nomen iuris} of the first case \footnote{On fiction, cf. R. LLANO CIFUENTES, \textit{Naturaleza jurídica de la «fictio iuris»}, Madrid, 1963, and F. TODESCAN, \textit{Diritto e realtà. Storia e teoria della fictio iuris}, Padova, 1979.}.

The gradualness of equivalence, measured on the basis of the greater or lesser relevance of the reality common to the two situations compared, must be constantly kept in view in order to apply this method with justice. Two opposite extremes must be avoided: that of too restricting the analogical application for fear of incurring a complete identification - a risk often motivated by the confusion between equivalence and juridical identity - \footnote{It seems to me that this is what happened with regard to the figure of personal prelatures. First the expressed equivalence of the Code to the particular Churches was removed because it was feared that an undue confusion would arise from it (cf. \textit{Pontificium Consilium de Legum Textibus Interpretandis - Acta et documenta Pontificiae Commissionis Codici Iuris Canonici Recognoscedo, Congregatio plenaria diebus 20-29 octobris 1981 habita, Typis Polyglottis Vaticanis 1991, 5a questio} of Personal Praelatures, p. 376-392 and 399-417) and then probably}
those categories and conclusions which are particularly specific to the starting point of an analogy - with the consequence of giving rise to problems badly established from the beginning - (20). We must be sensitive both to the similarities and to the differences, but with that spirit of authentic realism that must characterize the work of a good jurist.

To describe the various types of equivalence, it may be useful to bear in mind the classification of analogy that scholastic philosophy has patiently elaborated over the centuries (21). To understand juridical equivalence, it is opportune to resort especially to the analogy of proportionality, since transposing solutions from one institution to another is based precisely on the similarity of proportion existing between each of the situations under consideration, and the respective juridical solutions. Sometimes there will simply be an analogy of improper or metaphorical proportionality - based on structural similarities of a merely operational nature between realities that in nature or essence are not analogous - (22). Sometimes for the same reason, a particular place in the Code was chosen, in cann. 294-297, outside of Part II of Book II, on the hierarchical constitution of the Church. However, the fact remains that this figure becomes understandable and feasible only on the basis of an analogical relationship with the traditional forms of ecclesiastical organization, and so in a relation of equivalence in iure - which is not identification, not even juridical identity - with the particular Church (and therefore with the diocese, which constitutes the fundamental point of reference of the canonical norms on the subject).

(20) I am thinking, for example, of the analogical application of the characteristics of impotence to the inability to assume the essential obligations of marriage, which has motivated the discussion on what the expression “relativity” can cover or not. Without entering into this last problem, it seems to me that it reflects at the outset a conceptualistic approach, which unfortunately follows that widespread contemporary motivation consisting in a search for the extension of the grounds of nullity, as if this extension represented in itself a pastoral good, since it allows the Courts to "resolve" more cases of failed marriages.


(22) For instance, when can. 144 § 2 applies the institution of substitution of jurisdiction - as regulated by § 1 of this same canon - to the faculties mentioned in cann. 883, 966 and 1111 § 1, it does not intend in the least to affirm that these faculties constitute jurisdiction, but just the opposite: to apply the same rule to two realities that present only certain structural similarities that justify the commonness of certain operational effects. Another case could be found in can. 672 which extends to religious some of the obligations of clerics, without this leading in any way to an assimilation of the nature of these two canonical conditions. On the other hand, it seems to me that the extrinsic analogy of attribution, based on a causal relationship (such as that which makes it possible in Italian to use the same word “diritto” to
there will be a true analogy of proper proportionality, since the existing proportions and structural similarities are indeed based on a true similarity of being (23). The juridical equation in these cases will not extend to certain concrete effects, but it will affect the very nature of the institute and therefore the generality of the norms that apply to it, taken from the institute that represents the primary analogue (24). But we must never lose sight of the fact that these are only similar realities, which therefore continue to be - even juridically - different, with differences that could not be forgotten without introducing absurd confusions (25).

CARLOS J. ERRÁZURIZ M.

(Translation by Sakubita Lawrence Like, OMI
With permission and correction of the author)

apply both to “the law” and to “what is a right”, because the law is the cause of the right),
does not have a particular relevance for the problem that concerns us.

(23) In this hypothesis, there will also be an analogy of intrinsic attribution, which constitutes the real basis of proper proportionality. However, I believe that the logical legal instrument directly applied in these cases, is rather the analogy of proper proportionality, rather than that of intrinsic attribution.

(24) For instance, the analogy of military ordinariates and personal prelatures with particular Churches - and therefore with dioceses, which represent the primordial canonical form - is of this nature, since it is based on common ecclesiological elements - those proper to the communities of the faithful structured hierarchically - pertaining to the very nature of these institutions.

(25) To continue with the previous example, it would be completely misleading to bring the equality of military ordinariates and personal prelatures with particular Churches into substantial identification, attributing to them the characteristics of particular Churches - which these new structures intend to serve and in no way replace - or not taking into account their real differences when compared with particular Churches.